MOTION FILED OCT 26 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 235.

FAIRMONT ALUMINUM COMPANY,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING OUT OF TIME.

AND

SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

MOTION.

Petitioner respectfully moves for leave to file, out of time, the annexed second petition for rehearing of the order of this Court (350 U. S. 838) entered October 10, 1955, denying the petition for certiorari and the order of this Court (350 U. S. 905) entered November 21, 1955, denying a petition for rehearing of the aforesaid order of October 10, 1955. This motion and the annexed petition are based on the following grounds:

1. Subsequent to the denial of the petition for certiorari and subsequent to the denial of the petition for rehearing as enumerated above, this Court has decided to review *United States* v. *Ohio Power Co.,* No. 312, October Term, 1955 by its order of June 11, 1956,* (351 U. S. 980) entered *sua sponte,* although this Court had (1) previously denied certiorari on October 17, 1955 (350 U. S. 862), (2) denied a first petition for rehearing on December 5, 1955 (350 U. S. 919), and (3) denied a second petition for rehearing on May 28, 1956 (350 U. S. 958). The instant case herein, like *United States* v. *Ohio Power Co.,* involves, in our opinion, a like question: the degree of literalism with which an Internal Revenue Statute will be enforced or non-statutory qualifications read into the statute by a process of administrative and judicial "interpretation". We submit that the action of this Court in determining to review the *Ohio Power Co.* case, after the remarkable history hereinbefore set forth, emphasizes the importance of this basic question, and hence constitutes supervening action of substantial and controlling effect which warrants this Court in reconsidering the denial of certiorari in the instant case herein and its prior order denying the first petition for rehearing thereof.

2. There is now pending on this Court's Docket, as No. 371, October Term, 1956, the case of *Lasky* v. *Commissioner* on petition for certiorari to the Ninth Circuit. As set forth in the petition annexed hereto, the Ninth Circuit has decided *Lasky* v. *Commissioner* in a manner contrary to the decision of the Fourth Circuit in the instant case herein and that such conflict in the Circuits, arising subsequent to the filing of the petition for certiorari herein and the denial of the

* "The order of December 5, 1955, denying the petition for rehearing is vacated and the petition for rehearing is continued."

prior petition for rehearing thereof constitutes substantial grounds and supervening action which warrants this Court's reconsidering its action in the instant case of October 10, and November 21, 1955.

Jurisdiction.

The jurisdiction of this Court to entertain the petition for certiorari filed during the preceding Term of this Court was not denied by the Respondent's brief in opposition thereto. The expiration of that Term "in no way affects the power of the Court to do any act or take any proceeding." *Judicial Code* §452.

Prayer for Relief.

Wherefore, Petitioner prays that this motion be granted, that the annexed petition for rehearing be granted and that on such rehearing that the order denying the petition for certiorari be vacated and such petition be granted and the judgment appealed from reversed, and for such other and further relief as this Court may deem just and proper.

Dated: New York, N. Y.,
October 24, 1956.

Earl Q. Kullman,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 235.

FAIRMONT ALUMINUM COMPANY,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

Petitioner prays that this Court grant a rehearing of its order of October 10, 1955 (350 U. S. 838), denying certiorari herein and its order of November 21, 1955 (350 U. S. 905) denying the first petition for rehearing and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit in the entitled cause as prayed for in the petition filed July 14, 1955.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT:

1. At the time this Court's orders were entered as set forth in the preceding paragraph, the conflict in the Circuits was not as apparent as is now revealed by cases now before this Court for argument and by cases pending on this

Court's docket. The Respondent's opposition to granting of certiorari herein significantly omitted any contention that there was no conflict in the Circuits and inferentially at least admitted such conflict.

The importance of the questions presented by this petition are now more sharply underlined by the pendency on this Court's Calendar of the following cases:

United States v. *Allen-Bradley Co.*, No. 78, this term;

National Lead Company v. *Commissioner*, No. 124, this term;

United States v. *Ohio Power Co.*, No. 312, last term, order denying rehearing vacated and case continued by order of June 11, 1956 (351 U. S. 980).

The above cases involve the question of whether an Internal Revenue Statute (the provision for accelerated amortization of National Defense facilities) should be literally enforced as Congress has written it. The Government is contending that a non-statutory modification *can* be read into the statute by administrative and judicial interpretation. The Circuits and the Court of Claims are in conflict.

2. There is now pending on this Court's Docket as No. 371, *Lasky* v. *Commissioner*, petition for certiorari to the Ninth Circuit to review a dismissal of an appeal on jurisdictional grounds and its refusal to review the merits. That case involves the question whether an Internal Revenue Statute (the provision for determining the date when a Tax Court decision achieves finality) *must* be read with a literalism which denies a judicial review. Other courts, like the

Fourth Circuit in the instant case herein have refused to apply a like degree of literalism to other and comparable Internal Revenue Statutes.

3. In the instant case herein, we contended that 1939 Internal Revenue Code §276(g), requires the Tax Court to enforce the plain mandate of the Internal Revenue Laws and review the merits of the tax controversy presented by petitioner in the pleadings below. The Tax Court herein and the Fourth Circuit have read into the statute, by a process of administrative and judicial legislation, a non-statutory qualification (collateral estoppel by reason of a prior non-suit for failure of proof), *a subject on which Congress has never legislated.*

4. The question common to all of the cases hereinbefore referred to, including the instant case herein, is the degree of literalism to be accorded to the Internal Revenue Laws. The variant results reached in the Circuits indicate irreconcilable conflict and a pressing need for clarification by this Court.

5. The Fourth Circuit in the instant case reads a broad type of judicially developed *common law* collateral estoppel into the Internal Revenue Laws because the Tax Court is *"like"* a judicial court. The Ninth Circuit in *Lasky* v. *Commissioner,* No. 371, this term, *refuses* to read into the Internal Revenue Laws, the judicially developed *common law* doctrine of *coram nobis* and relief from excusable oversight because the Tax Court is *not "like"* a judicial court; it is, says the Ninth Circuit, an administrative agency strictly limited to its statutory powers. A like doctrine, if applied by the Fourth Circuit in the instant case herein, would have required a contrary result.

6. The doctrine of collateral estoppel by administrative action, the principal point involved in the instant case herein is also involved in the *Allen-Bradley Company* case, No. 78, *supra,* and the *National Lead Company* case, No. 124, *supra,* as the Government's reply brief in No. 78, pages 2-3, clearly shows:

> "Furthermore, the conflict between the decisions of the two courts (which was expressly recognized by the Court of Claims in its opinion in this case) arises from the fact that the Second Circuit refuses to permit a collateral attack, in the tax proceeding, on the administrative decision in certifying only part of the cost of the facilities, while the Court of Claims does precisely the contrary."

The decision of the Court of Claims in the *Allen-Bradley Company* case is, therefore, in direct and irreconcilable conflict with the decision of the Fourth Circuit in the instant case herein; while the decision of the Second Circuit in the *National Lead Company* case is directly contrary, without citation, of its prior decision in *Rosenblum* v. *Federal Trade Commission,* 214 F. 2d, 338 vacating a prior judgment entered after adversary proceedings, 192 F. 2d, 392 and after this Court had denied certiorari in the latter action, 343 U. S. 905. The *Rosenblum* case is cited, discussed and quoted at length at pages 14-15 of our petition for certiorari herein.

We submit this is the type of irreconcilable and embarrassing conflict which warrants the intervention of this Court herein.

7. The foregoing is limited to the cases which have supervened since the denial of the first petition for rehearing herein. The continuing of the petition for rehearing in

the *Ohio Power Company* case, *supra,* after twice denying rehearing and after denial of certiorari, indicates a pressing problem for solution of the basic question of interpretation of Internal Revenue Statutes.

It is submitted that we have shown substantial grounds for reconsideration by this Court of its prior action in denying review herein.

Conclusion.

The petition for rehearing should be granted, the denial of certiorari vacated and the petition for certiorari granted.

Respectfully submitted,

Earl Q. Kullman,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

EARL Q. KULLMAN,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

CERTIFICATE OF SERVICE.

I hereby certify that the foregoing petition and motion were served upon the Solicitor General by depositing copies thereof in a first class postpaid wrapper addressed to him at his office.

EARL Q. KULLMAN,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.